

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOANNE HURLEY,	)	
	)	No. 63361-9-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
SAFEWAY, INC.,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: May 3, 2010
_____	)	

BECKER, J. — Joanne Hurley seeks a new trial following a jury verdict awarding only a small fraction of the damages she sought against Safeway, Inc., for an injury she suffered at a Safeway store. The trial court did not err in refusing to exclude the defense medical expert's testimony for alleged discovery violations when the court found the delayed disclosure of the expert's testimony was caused by the plaintiff's conduct withholding evidence. Substantial evidence supports the jury's award of only a portion of Hurley's claimed special damages. And Hurley has not shown she was prejudiced by the court's accurate jury instruction directing that no damages for emotional distress could be awarded. We affirm.

## FACTS

On August 31, 2004, Hurley injured her ankle when she slipped on a substance on the floor in a Safeway grocery store. At the time, Hurley was working for DPI, a food marketing company. Hurley was injured while pushing a large cart of DPI goods through the store to place items on display shelves.

Hurley filed suit in 2007, seeking special damages for \$89,397.94 in medical bills, \$250,000 in lost wages and the cost of a college education, and an unspecified amount of general damages, including damages for mental pain and suffering and emotional distress.

In her June 2008 deposition, Hurley testified that she had been unable to work since leaving DPI in 2004. She also disclosed proposed medical and employment experts, who opined that because of her injury, she was only suited to sedentary work. Shortly after her deposition, Hurley stipulated to the dismissal of her claim for damages for mental pain and suffering or emotional distress.

In August 2008, Safeway disclosed a proposed medical expert, orthopedic surgeon Dr. Sean Ghidella. In its initial discovery responses, Safeway indicated only generally that Dr. Ghidella would testify about Hurley's injuries and whether her alleged accident was the cause of her claimed physical limitations. Although it identified Hurley's medical records as responsive to further requests regarding Dr. Ghidella, Safeway did not provide a specific offer of proof of his testimony.

Trial was set before Judge John P. Erlick for January 26, 2009. In the weeks leading up to the trial date, a former roommate of Hurley's unexpectedly contacted counsel for Safeway and provided them information challenging Hurley's claims about her employment and physical condition. In addition, two weeks before trial, one of Hurley's experts inadvertently disclosed tax records showing Hurley had worked at various jobs, primarily bartending, during the period she had testified in her deposition that she had not worked. This information led counsel for Safeway to discover additional information about Hurley contained in internet advertisements, a loan application, and a bankruptcy filing. After providing Dr. Ghidella these and other materials, Safeway disclosed his anticipated testimony to Hurley's counsel on January 23.

That same day, Hurley moved before Judge Julie Spector to exclude any testimony from Dr. Ghidella from trial because of the late disclosure of his proposed testimony. Safeway responded that it had not intended to call Dr. Ghidella to testify until the new evidence regarding Hurley's work history and condition had surfaced, which provided Safeway facts to make an argument regarding proximate cause it had not previously intended to advance. Judge Spector denied Hurley's motion to exclude, finding that "Plaintiff has created the delay in Dr. Ghidella's 'late' conclusions and opinions."<sup>1</sup> Judge Spector thereafter denied Hurley's motion to reconsider.

Judge Erlick presided over the six day trial. During the course of the trial,

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<sup>1</sup> Clerk's Papers at 210.

Hurley unsuccessfully renewed her motion to exclude Dr. Ghidella's testimony.

At the conclusion of the evidence, based on the stipulation for dismissal of Hurley's claim for emotional distress damages, Safeway proposed a jury instruction stating that "plaintiff is not claiming emotional distress damages. If you find for the plaintiff your award cannot include damages for emotional distress."<sup>2</sup> The trial court gave the instruction over Hurley's objection.

The jury returned a verdict awarding Hurley \$1,200.00 in special damages and no general damages.

Hurley moved for a new trial, arguing there was an inconsistency in the jury's award of special damages. Because the jury found Safeway 100 percent at fault, Hurley contended it necessarily should at least have awarded her the entirety of her claimed medical damages. Hurley also argued that she should either receive a new trial on the issue of general damages or, alternatively, that the court should impose such an award by way of additur. The trial court found the jury's partial award of special damages within the range of the evidence because the jury could have relied on credibility determinations to adopt Safeway's theory of proximate cause that Hurley had significantly exacerbated what were initially only slight injuries by failing to follow medical advice and continuing to work at hard physical labor. The court did grant an additur, which Safeway accepted, awarding Hurley \$3,500 for pain and suffering general damages, consistent with the court's view of the jury's intent expressed in its

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<sup>2</sup> Clerk's Papers at 390.

special damages verdict. The court also denied Hurley's motion for a new trial based on counsel's renewed objections to the disclosure of Dr. Ghidella and the instruction on emotional distress damages.

Hurley appeals.<sup>3</sup>

## DISCUSSION

### 1. Exclusion of Dr. Ghidella's Testimony

Hurley first contends that the trial court erred in denying her motion to exclude Dr. Ghidella's testimony. The abuse of discretion standard governs our review of the trial court's discovery orders. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Excluding testimony is an extreme remedy and "it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987) (quoting Smith v. Sturm, Ruger & Co., 39 Wn. App. 740, 750, 695 P.2d 600, review denied, 103 Wn.2d 1041 (1985)). A discretionary decision "should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Burnet, 131 Wn.2d at 494 (quoting Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 229, 548 P.2d 558, review denied, 87 Wn.2d 1006 (1976)).

Hurley characterizes the new information that came to light in January 2009 as merely the belated discovery of a few W-2 statements, which, she

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<sup>3</sup> In its response brief, Safeway has moved to strike Hurley's brief. The motion is denied under RAP 17.4(d) ("A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits.").

argues, does not excuse Safeway's dilatory behavior. But Hurley vastly understates the significance of the new evidence, which included specific employment Hurley had not disclosed in her deposition, Hurley's use of three different social security numbers, Hurley's claims about earnings and work history in a loan application, representations on an internet site about Hurley's abilities and earnings as a bartender, and photographs suggesting her injury was not as severe as claimed. Not only did the new evidence generally contradict Hurley's deposition testimony about her condition and employment, it supported Safeway's argument that she had willfully hidden evidence. As counsel indicated in responding to Hurley's motion, it provided Safeway a basis to dispute that all of Hurley's injuries were caused by her accident in the grocery store.

Under the circumstances, the trial court's discovery ruling was reasonable. The court could justifiably view Safeway's failure to disclose the specific nature of Dr. Ghidella's testimony as harmless during the period in which Safeway did not anticipate actually calling him. When the additional information came to light just before trial, it appears Safeway justifiably reconsidered its litigation strategy and provided the information about Dr. Ghidella's anticipated testimony as timely as practicable. The court did not abuse its discretion in denying Hurley's motion.

## 2. Sufficiency of the Evidence for the Special Damages Award

Hurley next contends that the jury's verdict on special damages was

contrary to the evidence. She argues the evidence was uncontroverted that all her medical bills were caused by Safeway's negligence. See Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 636, 865 P.2d 527 (1993) ("In determining whether a new trial should be granted because of inadequate damages, the trial court and this court are entitled to accept as established those items of damage which are conceded, undisputed, and beyond legitimate controversy."), review denied, 124 Wn.2d 1005 (1994).

The determination of the amount of damages is generally within the jury's province, and appellate courts are reluctant to interfere with a jury's damage award. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

Consequently, we review the trial court's decision whether to grant a new trial on the basis of inadequate damages for an abuse of discretion. Palmer, 132 Wn.2d at 197. "A trial court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence." Fahndrich v. Williams, 147 Wn. App. 302, 306, 194 P.3d 1005 (2008). We view the evidence in the light most favorable to the party that prevailed before the jury, in this case, Safeway.

Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 534, 627 P.2d 104 (1981). "If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury." Lockwood v. AC & S, Inc., 109 Wn.2d 235, 243, 744 P.2d 605 (1987) (quoting Levy v. N. Am. Co. for Life & Health Ins., 90 Wn.2d 846, 851, 586 P.2d 845 (1978)).

Hurley does not consider the evidence in the light most favorable to



Safeway. Her argument that the trial court erred in denying her motion for a new trial fails because the evidence of proximate cause here was controverted.

Proximate cause consists of two elements: cause in fact and legal causation. Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 328, 111 P.3d 866 (2005), review denied, 156 Wn.2d 1008 (2006). At issue here was cause in fact, the immediate connection between an act and an injury. Versuslaw, Inc., 127 Wn. App. at 328. We conclude the disputed evidence here provided the jury a proper basis to limit its award of special damages because it could rationally find that Safeway's negligence was the proximate cause of only an initial, comparatively slight injury to Hurley.

Dr. Ghidella opined that Hurley sustained only a minor injury as a result of her slip at the Safeway store, which she then significantly exacerbated by failing to follow her treating doctor's advice. His opinion was supported by inferences that could be drawn from other evidence. Initial x-rays of Hurley's ankle showed a simple sprain. Hurley's initial doctors, on September 1 and September 3, 2004, each recommended light duty, but Hurley continued to work for nearly two months for DPI on full work duty, including overtime, in her regular, physically demanding job. Hurley did not visit a doctor again until October 26, 2004, and a November 15, 2004 MRI (magnetic resonance imaging) scan showed chronic and acute injuries more severe than were displayed on September 1. While Hurley maintained she had fully disclosed her limitations to her DPI supervisor and was essentially told she had to continue working or be fired, the supervisor

testified that Hurley did not disclose the limitations the doctors had placed on her for several weeks and that DPI accommodated Hurley as soon as they became aware of the limitations.

As the trial court concluded in denying Hurley's motion, the jury's award of only \$1,200 of Hurley's claimed medical special damages was consistent with a rational conclusion that Hurley's initial treatment, prescription medication, and roughly eight days of wage loss were attributable to Safeway, and that additional treatment she needed and damages she suffered were not proximately caused by Safeway. Because the disputed evidence could be viewed as raising legitimate doubts as to the causal connection between the full range of Hurley's injuries documented at the January 2009 trial and the August 2004 incident for which the jury found Safeway liable, we cannot find the trial court erred in declining to grant a new trial on the basis of inadequate damages. See Gestson v. Scott, 116 Wn. App. 616, 622, 67 P.3d 496 (2003).

### 3. Jury Instruction for Emotional Distress Damages

Hurley contends she was prejudiced by the court's erroneous instruction to the jury not to award emotional distress damages. We disagree.

A jury instruction is erroneous when it does not properly inform the trier of fact on the applicable law, but erroneous instructions are reversible only when prejudicial. See Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994); Lewis v. Simpson Timber Co., 145 Wn. App. 302, 318, 189 P.3d 178 (2008). The test for the sufficiency of instructions involves three

determinations: (1) that the instructions permit the party to argue that party's theory of the case; (2) that the instructions are not misleading; and (3) when read as a whole, all the instructions properly inform the trier of fact on the applicable law. Leeper, 123 Wn.2d at 809. We review the accuracy of an instruction's statement of the law de novo. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). A trial court's decision regarding the wording or giving of a particular jury instruction, however, is reviewed for abuse of discretion. Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

Before trial, Hurley stipulated to the dismissal with prejudice of her initial claim for damages for “mental . . . pain and suffering, and emotional distress.”<sup>4</sup> The instruction was therefore a correct statement of the law. But Hurley nonetheless argues that the instruction was unnecessary and confusing. She maintains that the jury's refusal to award any general damages despite awarding special damages proves she was prejudiced because the jury must have decided the instruction precluded even physical pain and suffering.

In choosing to give the instruction over Hurley's objection, the trial judge reasoned there was otherwise a risk that the jury could wrongfully award emotional distress damages as falling within Hurley's general claim for noneconomic damages. As the judge noted, the general damages instruction included the broad term “loss of enjoyment of life,” which, in the absence of such an instruction as Safeway proposed, might be thought to include damages for

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<sup>4</sup> Clerk's Papers at 11 (alteration in original).

mental rather than physical pain and suffering.<sup>5</sup> Hurley does not even mention this basis for the trial court's ruling, much less show it rested on untenable grounds. We find no abuse of discretion by the trial court.

We also do not find any likelihood that the instruction prejudiced Hurley by confusing or misleading the jury as she claims. Hurley's counsel displayed no difficulty in distinguishing emotional distress damages in arguing to the jury that Hurley should receive damages for loss of enjoyment of life caused by her continuing physical pain and permanent disability and injury. And as discussed by the trial court and counsel during the hearing on Hurley's motion for a new trial, it appears that the jury's determinations regarding both special and general damages were the result of the jury's agreement with Safeway's argument regarding proximate cause and the view that Hurley personally lacked credibility in testifying to anything beyond her initial minor injury.

We find no reversible error and accordingly affirm the trial court.

Becker, J.

WE CONCUR:

Spencer, J.

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<sup>5</sup> Clerk's Papers at 388.

Schneider, J